Supreme Court, U.S.
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App. No. _____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

IN RE: C. LYNN MOSES,
Petitioner

ON PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241
AND THE CONSTITUTION OF THE
UNITED STATES OF AMERICA,
ARTICLE I, § 9

PETITION FOR WRIT OF HABEAS CORPUS

Blake S. Atkin*
ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Attorney for Petitioner C. LYNN MOSES
*Counsel of Record

QUESTION PRESENTED FOR REVIEW

Whether your Petitioner is being held unlawfully and unconstitutionally having been convicted of violating the Clean Water Act for having maintained for twenty years, under contract with Teton County, a flood control channel through uplands where no wetlands are located; when the regulations that existed in 1980 when he first undertook that maintenance put this flood control device outside the jurisdiction of the Clean Water Act; and after this Court's decision in Rapanos v. United States, 126 S.Ct. 2208 (2006), and even after promulgating regulations requiring an individualized analysis of Clean Water Act jurisdiction, using criteria that definitely exclude this upland ditch from such jurisdiction, no government agency, prosecutor, nor any Court has undertaken the analysis to determine whether this upland ditch your Petitioner maintained that carries water for less than two months out of the year, was within the jurisdiction of the Clean Water Act.

LIST OF PARTIES TO CONVICTION

Petitioner C. Lynn Moses was the Defendant in this matter.

Respondent United States of America was the Plaintiff in this matter.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE COURTS

U.S. v. Moses, 496 F.3d 984 (9th Cir. 2007)

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BASIS FOR THE COURT'S JURISDICTION

This Court's jurisdiction is invoked pursuant to the United States Constitution Article I Section 9; 28 U.S.C. § 2241; and United States Supreme Court Rules, Rule 20.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES OF AMERICA, ARTICLE 1, § 9:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. § 2241:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and

> any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

33 U.S.C. § 1251

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

REASON WHY APPLICATION FOR WRIT OF HABEAS CORPUS IS NOT MADE TO DISTRICT COURT

The jurisdictional question presented by this Petition for Writ of Habeas Corpus was presented to the District Court in a motion pursuant to 28 U.S.C. § 2255. The District Court, in denying that motion, refused to address the jurisdictional issue claiming that it had been answered on direct appeal and therefore it could deny the motion without addressing the jurisdictional issue. While it is true that the issue has been repeatedly addressed to the Courts and to the two agencies involved—the EPA and the Army Corps of Engineers, to date, no one has answered the question presented. Such dodging of the issue is unbecoming a Court of these United States and leads the Petitioner to doubt the possibility of a fair hearing on the issue before the District Court. The rule of law set out by this Court in its Rapanos v. United States, 126 S.Ct. 2208 (2006), decision needs to be applied to your Petitioner's case. When that is done there is no logical way to find that the removal, when no water is present, of last year's gravel washed down from an upland ditch in order to control flood waters that run at most, for two months of the year and that do not wash any of the disturbed gravel into a navigable water has a significant nexus to the physical, biological, or chemical integrity of a navigable water of the United States. Your Petitioner deserves to have his question about jurisdiction answered, and it is apparent from reading the Court of Appeals

decision and the District Court's denial of the 2255 motion that the lower court's are not going to answer it.

FACTS RELATING TO DETENTION OF PETITIONER

Petitioner, C. Lynn Moses, reported to the Bureau of Prisons to begin an eighteen (18) month sentence on August 6, 2008. He currently is on home confinement and is scheduled to begin a one year period of supervised release beginning on November 26, 2009.

The conviction and sentence is illegal because it is based on a conviction for which there was no jurisdiction. Mr. Moses, as president of a homeowner's association, was convicted of violating the Clean Water Act by performing flood control activities, required by contract between the homeowner's association and Teton County, in an area watered only intermittently (less than two months out of the year); that contains no wetlands; and which has never been determined to be within the jurisdiction of the Clean Water Act. In fact, when the flood control activities began in 1980, the Army Corps of Engineers specifically determined that the area was not within its jurisdiction under the Clean Water Act.[1] The procedure spelled out in the agency regulations for changing that

[1] Teton County invited the Army Corps of Engineers to solve the flood control problem in the area. The Corps of Engineers specifically denied jurisdiction. Thereafter, the county required Mr. Moses, by contract, to perform the flood control activities for which this indictment followed.

determination was never followed and there has never been a determination of jurisdiction under the Clean Water Act over the area in question.

Our Constitution, with its Bill of Rights and other guarantees of human dignity and freedom, would be meaningless were it not for the procedural due process guarantees that are guaranteed by our Constitution and held strictly sacrosanct by this Court. Many totalitarian regimes throughout the world have touted constitutional guarantees that on paper sound as profound as our own, but since there are no procedural guarantees of fairness in their systems of justice, their constitutions are a "paper tiger" and the fine sounding guarantees have no true worth.

There is perhaps no more important procedural guarantee than that of jurisdiction. The requirement of jurisdiction is so essential to ordered government that it is the one defect in a proceeding that cannot be waived, and is raised *sua sponte* by the Courts whenever it is recognized. Kontrick v. Ryan, 540 U.S. 443, 455, 124 S.Ct. 906, 915 (2004), citing Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884) (challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question *sua sponte*). If this Court upholds and condones the continued detention of Mr. Moses when the Government has failed to make a determination of jurisdiction under the Clean Water Act, which its own regulations require, it will be condoning a mockery of our constitutional way of

life.[2]

The conviction in this case centered around the Petitioner's activities in 2002, 2003, and 2004, in cleaning a flood channel that had been established in 1980. In 1980, when the flood channel in question was established, Mr. Moses and Teton County inquired of the Corps of Engineers whether a permit was required for the flood control work. They were told that because the area received water only intermittently, the Corps of Engineers had no jurisdiction. See, Declaration of Bill Scott with accompanying newspaper articles (Appendix, *infra*, pp. 1a-13a).

Over the next twenty years, as new personnel would join the Corps, some would suggest Mr. Moses needed a permit to continue maintenance of the flood control channel. Mr. Moses would remind them of the events that had occurred in the early 80's and the Corp's determination at that time that it did not have jurisdiction of this area. See, Letter from Lynn

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[2] In an attempt at ill timed humor, the Court of Appeals revealed its failure to grasp the issue Mr. Moses has repeatedly sought to be answered. In trying to laugh away the government's failure to apply a site specific analysis to this case the Court stated that even if Moses was misled by the Government's initial failure to assert jurisdiction over this area, his "sang-froid" when it later asserted jurisdiction showed either his courage or his "foolhardiness." What the Court missed is that once this area was determined to not be within Clean Water Act jurisdiction, it required a site specific analysis to bring it back into the jurisdiction of the Corps and the EPA. That was true under the 1980 regulations and, as Rapanos found, that requirement never changed. Is it foolhardy for a citizen to expect his government to follow its own regulations before imprisoning him?

Moses to the Corps of Engineers, (App., *infra*, pp. 14a-16a). The government would then go away, sometimes for several years, until the next new faces appeared in the agency.

In 2002, 2003, and 2004, a new set of faces, this time at the Environmental Protection Agency ("EPA"), an agency that had never before asserted jurisdiction, threatened Mr. Moses, the president of the home owners association with criminal prosecution unless he stopped his contractually required maintenance of the flood control channel. Mr. Moses again reminded them of the determination made in the early 80's that the Corps had no jurisdiction, but this time the agency continued with this prosecution even though there has never been an agency determination, by either the Corps of Engineers nor the EPA, that the area in question is within the jurisdiction of the Clean Water Act.

The United States Supreme Court made it clear in Rapanos v. United States, 126 S.Ct. 2208 (2006), that Clean Water Act jurisdiction does not reach to everything wet, but that there are in fact limits to federal jurisdiction under the Clean Water Act. After Rapanos, the Corps of Engineers and the EPA issued guidelines to its operatives on how to go about determining jurisdiction over areas that are not clearly within the jurisdiction of the Clean Water Act. See, Clean Water Act Jurisdiction following the U.S. Supreme Court's decision in Rapanos v. United States and Carabell v. United States, (App., *infra*, pp. 17a-42a). Despite those guidelines, neither the EPA nor the Corps of Engineers has ever applied the criteria in those guidelines to the area in question in

order to make a determination whether there is Clean Water Act jurisdiction of the area in which Mr. Moses performed flood control activities. Without such a determination his detention is without jurisdiction and is illegal.

Had the agencies undertaken the jurisdictional analysis required by the Court's Rapanos decision and their own regulations they would have determined that they do not have jurisdiction over this area and the travesty of justice that this petition is attempting to remedy would never have been an issue.

In Clean Water Act Jurisdiction following the U.S. Supreme Court's decision in Rapanos v. United States and Carabell v. United States, (App., *infra*, pp. 17a-42a), the EPA and the Corps of Engineers set out the criteria by which a determination to assert jurisdiction over an intermittent stream is to be judged. Under their own criteria, a significant nexus between Mr. Moses' activity and the physical, biological, or chemical integrity of a navigable water of the United States is not to be had.

First, the Agencies set out those features over which they will not assert jurisdiction. Mr. Moses' flood control channel fits directly into this description:

> The Agencies generally will not assert jurisdiction over the following features:
> * * *
>
> Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

See, Clean Water Act Jurisdiction following the U.S.

Supreme Court's decision in Rapanos v. United States and Carabell v. United States, (App., *infra*, p. 18a).

The Agencies defined "relatively permanent flow of water" as "waters that flow year round or that have a continuous flow at least seasonally (e.g., typically three months)." Clean Water Act Jurisdiction following the U.S. Supreme Court's decision in Rapanos v. United States and Carabell v. United States, (App., *infra*, p. 27). This fundamental criterion immediately removes Mr. Moses' activities in this flood control channel from consideration. Mr. Moses' activities were to dig a ditch, albeit a big one, in which to control the flood waters that would normally flow through the area in a plane. The government stipulated at the trial court level that there are no wetlands in this area. See, Excerpt from Trial Record, (App., *infra*, pp. 43a – 44a). Therefore what the evidence showed at trial is a ditch that drains only uplands. The evidence at trial was that this channel was used for flood control purposes for only two months, in the years when there was any flow at all. See, Excerpt from Trial Record, (App., *infra*, pp. 45a-46a). This upland ditch that does not carry a continuous flow for at least three months is viewed by the agencies as being outside their jurisdiction. Clean Water Act Jurisdiction following the U.S. Supreme Court's decision in Rapanos v. United States and Carabell v. United States, (App., *infra*, pp. 17a-42a).

If that were not enough, even if the agency were to consider this channel on a case-by-case basis, its own criteria would weed out this prosecution.

In order to assert jurisdiction, the agencies must determine that a particular activity or feature has a significant nexus to the purpose of the Clean Water Act which is to preserve the physical, chemical, and biological integrity of the Nations navigable waters. 33 U.S.C §1251. This determination is, of course, required by the Kennedy concurrence in Rapanos.

It is undisputed that the area where Moses built this flood control channel is not a navigable water of the United States so that what he did had no impact on the physical integrity of a navigable water of the United States.

Likewise, there is no suggestion that Mr. Moses introduced any chemical or biological agent whatever into the area. Even the trees that were used as log jams were trees washed down with the latest flood. Thus, there can be no argument that his actions affected the chemical or biological integrity of a navigable water of the United States.

This conclusion becomes more painfully obvious when the Court considers that the undisputed evidence at trial was that even the gravel that he is accused of disturbing through his annual maintenance of the flood channel never made it to the Teton River – the navigable river into which the flood waters of the channel may sometimes reach. There is no aquatic environment in this area. See, See, Excerpt from Trial Record, (App., *infra*, pp. 47a-48a). And there are no wetlands through the area of this flood control channel. See, Excerpt from Trial Record, (App., *infra*, pp. 43a – 44a). There simply can be no argument made that Mr. Moses' activities

had any effect on the physical, chemical, or biological integrity of any navigable water of the United States. Therefore there is no jurisdiction under the Clean Water Act and the sentence in this case is illegal.

To this point, the government and the Courts' answer to Mr. Moses' jurisdictional challenge has been to deflect the question by stating it has already been answered. But this Court cannot ignore these fundamental issues of jurisdiction and still contend that we are part of a civilized nation. Mr. Moses has repeatedly asked each court that has reviewed his case to address the jurisdictional issues, but no one can point to any decision—either by the District Court or by the Court of Appeals—where the Court has addressed the requirement that the agencies undertake a site specific review of this area only intermittently blessed with water, to determine whether there is a significant nexus between Moses' activities thereon and the physical, biological, or chemical integrity of a navigable water of the United States. See, Rapanos v. United States, 126 S.Ct. 2208 (2006). Mr. Moses' demands, that a jurisdictional determination be made, fell on deaf ears when he repeatedly, over a twenty year period, asked the agencies to do it before the prosecution was brought, and his arguments that Clean Water Act jurisdiction be determined before he pay the price of conviction were likewise ignored by the Courts. If there was any doubt before Rapanos, there is no doubt now, that jurisdiction over intermittent water can only be exercised after a site specific review of the area involved. The early review of this area resulted in an agency determination that there was

no jurisdiction, and no such site specific review has ever been made thereafter to reverse that first determination.

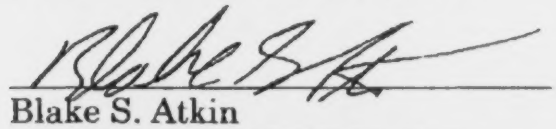
The regulations that existed in 1980 when the flood control activity first began would have allowed the Corps of Engineers to exercise jurisdiction over this area, but only after the District Engineer made a site specific determination that such exercise of jurisdiction was justified. 33 C.F.R. § 323.2 (1977), footnote 3. Apparently, such a site specific analysis was made at that time and the Corps determined that it did not have jurisdiction. See, Declaration of Bill Scott with accompanying newspaper articles (Appendix, *infra*, pp. 1a-13a). In "Flood Hearing Stirs Controversy", Bill Scott stated, "[c]ontacted by telephone in Walla Walla, Washington, a district spokesman for the Corps is looking into the situation, and if it determines Teton Creek to be not intermittent, it will claim jurisdiction over the matter, the spokesman said". See, "Flood Hearing Stirs Controversy" news article attached to Declaration of Bill Scott, (App., *infra*, pp. 7a-13a). There is no evidence that that initial determination that there was no Clean Water Act jurisdiction, because this area was only intermittent, has ever been reversed by any later site specific determination.

CONCLUSION

Because there is no demonstrated Clean Water Act jurisdiction over the area in which Mr. Moses performed his flood control activities, his immediate release from any further impediment of this conviction must be immediately ordered.

DATED this 25th day of November, 2009.

ATKIN LAW OFFICES, P.C.



Blake S. Atkin
ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Attorney for Petitioner

APPENDIX

Blake S. Atkin (ISB# 6903)
7579 North Westside Highway
Clifton, Idaho 83228
Telephone: (208) 747-3414

ATKIN LAW OFFICES, P.C.
136 South Main Street, Suite A401
Salt Lake City, Utah 84101
Telephone: (801) 533-0300
Fax: (801) 533-0380

Attorney for Defendant

UNITED STATES DISTRCIT COURT FOR THE
DISTRICT OF IDAHO
UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

C. LYNN MOSES,

Defendant.

DECLARATION OF BILL SCOTT

CR No. 05-0061-B-BLW

I, Bill Scott, under penalty of perjury, depose and state as follows:

1. I am over the age of 18 years of age and am competent to testify about the matters set forth herein. I make this declaration on the basis of personal knowledge.

2. I am an independent party and have no personal interest in the outcome of this case.

3. As a reporter I hold myself to the highest ethical standards and stand by the truthfulness of the articles that are published under my name.

4. I attended a public hearing on June 9, 1982 regarding the flooding that had taken place the year prior and was imminently expected in Driggs, Idaho.

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5. At the meeting, I took notes and recorded the events that took place in my notes and shortly after the meeting, and provided the information for the article on June, 11, 1982 entitled A Driggs fears worsening flood dangers, @ that appeared in the Idaho Post Register attached hereto as Exhibit "A."

6. I authored the attached article that appeared on June 17, 1982 in the Teton Valley News attached hereto as Exhibit "B."

7. The articles accurately set out what took place at the meeting that took place on June 9, 1982 as I was in attendance at the meeting.

8. I attended the meeting as a news correspondent and had no financial stake in the outcome of the meeting.

I declare under penalty of perjury and upon personal knowledge that the foregoing is true and correct.

Dated this 28 day of March, 2006, Idaho Falls, Idaho.

__/s/_____
BILL SCOTT

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Exhibit A

Driggs fears worsening flood dangers
By BILL SCOTT
Post-Register correspondent

DRIGGS – One year after flood waters nearly invaded Driggs, residents and local irrigators are fearful of a worse flood this year and blaming each other for the predicament.

At a public hearing here Wednesday some residents blamed the increased flood danger on stream channeling in a subdivision on the creek. These concerns were discussed with officials of several government agencies, in an effort to determine where the responsibility lies.

Lynn Moses, developer of The Aspens subdivision, which straddles Teton Creek one-half mile east of the city limits, placed the blame for last year's flood on inadequate culveris under the county

road bordering his property. Others blamed Moses, for doing the channelization work The Teton County Board of Commissioners and its Planning and Zoning Commission for approving the subdivision in the first place; the Driggs City Council for the same reason; the Bureau of Water Resources and Corps of Engineers for allowing the channelization work to be done; and mother nature for dropping a heavy cloudburst in Teton County at the wrong time.

Main channel

Teton Creek enters the subdivision property in one main channel; and splits into three channels within the property boundaries. The county road (Driggs Cemetery rd.) bordering the property has three sets if culveris, one at each channel. Work done by the developer closed off the two smaller channels and deepened the main channel. When last year's cloudburst hit, water ran over the banks, onto the road, and into town.

The channelization work was done without knowledge of or permission from the Bureau of Water Resources or the Corps of Engineers, and representative of both agencies at the hearing said they had no jurisdiction in the matter because they classify the stream as intermittent and therefore permits for such work are not required.

Teton County Planning Administrator Dan Letham said the subdivision was approved "contingent upon channelization" of the stream bed.

Given warning

"The developers were adequately warned that this area floods," Lethan said, adding that they were told to set up a homeowner's association which would have stream maintenance as "a continuous project."

"Lynn (Moses) indicated he had permits to do the channelization," Letham said. "It's their responsibility," he added.

Lowell Curtis, chairman of the Teton County Board of Commissioners, said the county had been unaware that the water was being restricted to one channel. "We can't go in there and divert water," back into the other channels, Curtis said. He laid responsibility for that on the developers.

Several lifetime residents of the area testified that the subdivision property is known to flood almost every year. One said it was "God's way" for the stream to split into three channels and "they've molested that."

Flood plan

Water used to backup into the subdivision, which some referred to as a flood plan, rather than move onto the road and into town.

"Anybody that's lived here knows that's a flood plan," one said, a sentiment also expressed by others. No homes have been built in the subdivision, which is owned by Moses, Charles Peak and Mark Rockefeller, all of Teton County. Last year's flood damaged the subdivision property, however, and Moses earlier this year filed a claim for $1,200 for damages. The claim was denied.

Irrigators at the hearing said they were fearful the channelization would interfere with headgates and canals downstream from the subdivision. Those whose canals come from upstream of the subdivision were concerned as well, worried that they may be forced to take more water in their canals than they can handle if another flood condition arises, resulting in flood damage to other areas.

Authority unclear

No clear authority or responsibility was determined at the hearing, which Curtis had called to "answer questions and speak to concerns." Establishing such authority would partially depend on whether the stream should be classified as intermittent or continuous, and whether the subdivision property should be considered a flood plain.

Irrigation water taken from the creek leaves it dry much of the year, prompting the government agencies to classify it as intermittent and therefore out of their jurisdiction. However, the stream would flow year round if the water was not diverted. County Attorney Russell Webb said that leaves the legal classification in question. Webb also said that what he described as "very strong language" in the county's subdivision ordinance leaves "a serious question in my mind whether the subdivision is legal." The ordinance provides that for subdivisions within a flood plan, "the developer shall demonstrate conclusively...that such development will not present a hazard to life, limb or property."

Lots of snow

With water content of the snow in the mountains this year higher than average and much higher than last year, the one point agreed upon by those present was that the potential for more serious flooding is there. So far, cool weather has kept water flow down, but county Civil Defense Director Jim Park said he was "very seriously concerned about the flood threat this year."

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Exhibit B

Flood Hearing Stirs Controversy
By Bill Scott
Staff Writer

Just over one year ago, on June 9, 1981, warm weather and a cloudburst in Teton Canyon sent waters swirling down Teton creek, overflowing the banks, running down the roads and in to the edge of Driggs.

This year, with mountain snows deeper than average and much deeper than last year, many are nervously eyeing the weather and fearful of an even worse flood.

At a public hearing at the courthouse last week, many laid the blame for the seriousness of last year's flooding on stream channelization work done by the developers of the Aspen subdivision, which borders Teton Creek about one-half mile east of the city limits.

Officials of several government agencies, local, state and federal, attended the hearing at the request of the Teton County Board of Commissioners, which called the hearing, and spent nearly 3 ½ hours in a buck-passing session which left responsibility for the flood situation as far up in the air as it had been prior to the hearing. While the consensus appeared to be that the channelization work had exacerbated the problem, none would take the responsibility for having allowed the work to be done, no facts were presented to prove responsibility on any side, and no solutions to the problem were reached.

In further developments since the hearing, one agency says it may have jurisdiction the matter, but

as yet has not decided what to do about it. Other agencies continue to deny responsibility, and the developers of the subdivision have refuted statements made at the hearing, saying they were based on hearsay and conjecture.

The Aspens subdivision is owned by three men, Lynn Moses, Mark Rockefeller and Charlie Peak, all of Teton County. It comprises 30 lots on 50 acres, and was approved as a subdivision about two years ago by the Teton County Planning and Zoning Commission, and the Teton County Board of Commissioners.

The area was known to flood during high water periods, and the subdivision was approved "contingent upon channelization" of Teton Creek, according to Dan Letham, Teton County subdivision ordinance administrator, who testified at the hearing. Letham said he understood there was to be no

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Flood Controversy

Continued from page 1

re-routing of the stream, just channel enlargement, and that "Lynn (Moses) indicated he had permits for the work."

Ernest Carlsen, assistant regional supervisor of the Idaho Department of Water Resources in Idaho Falls, and Harold Borgers of the US. Army Corps of Engineers, both testified at the hearing that they had no knowledge of the stream work and had not been asked for permits. Both also said that permits would not have been required in any case, because

they classified the stream as intermittent and therefore out of their jurisdictions.

Moses testified that he had not asked for permits because he knew the stream was intermittent and therefore permits were not required. In a subsequent conversation with the Teton Valley News he said he had not told Letham that they had permits, but "may have told him we could get permits if we needed then," and that Letham "may have misunderstood the statement."

Contacted by telephone in Walla Walla, Washington, a district spokesman for the Corps is looking into the situation, and if it determines Teton Creek to be not intermittent, it will claim jurisdiction over the matter, the spokesman said.

"We are just becoming familiar with it. The only thing I can tell you now is that at the present time it appears we will be sending a 'cease and desist' order to the developers," the spokesman said. He said if the stream is classified as year-around, the channelization work would be in violation of the federal Clean Water Act of 1977, which prohibits fill work below a stream's high water mark without a section 404 permit from the Department of the Army.

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No determination has been made as to how the situation will be resolved, the spokesmen said. "We'll work out how to resolve the violation or whatever has been determined there," the spokesmen said.

Moses and Rockefeller maintain that the stream is intermittent, and would be even without irrigation diversion.

"The stream here is dry for eight to ten months of the year, and never runs in the winter, even though there is no diversion then," Moses said. The stream does run year around through Alta, he said, but hits a subsurface hard-pan layer and disappears underground for several miles after it crosses into Idaho.

Lavell Johmson, a watermaster for the Grand Teton Canal which is diverted from Teton Creek in Wyoming and runs into Idaho, testified at the hearing that right now the stream loses 360 cubic feet per second (c.f.s.) between the Alta school house and the culverts at the lower end of the subdivision, and the water is going into the aquifer.

Moses and Rockefeller said no re-routing of the channel was done, but the main channel was cleaned out and deepened, and in two locations in the subdivision, old channels were cleaned out and re-opened. They said the channel running through the subdivision

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was capable of carrying flood-level flows, but that the water backs up at the county road at the lower end of the subdivision (the Driggs Cemetery Road) because the culverts there are inadequate to carry the flow.

They say county officials have known about the inadequacy since before the subdivision was approved, but have refused to replace the culverts with a bridge which could handle the flow.

The Idaho Department of Water Resources maintains records of peak flows in Teton Creek, both above and below irrigation diversions. Last year's

peak flow, recorded below the Grand Teton Canal diversion on June 9, was estimated at 1,900 c.f.s. The previous recorded high at that point was 880 c.f.s., recorded June, 28, 1968. Typical recorded peak flows, since 1950 have been less than 600 c.f.s.

George Matejko, a hydrologist for the U.S. Forest Service, testified at the hearing that the 100-year flood level would be about 1,300 c.f.s., and classified last year's level as "at least a 135-year flood." The maximum water carrying capacity of the culverts under the county road below the subdivision is 785 c.f.s., according to engineer Arnold Woolstenhulme, who performed hydrologic study for the developers prior to their stream work. Concrete and gravel obstruct, part of the flow through the culverts now, Moses said, and trees and other debris which high water carries downstream can further obstruct flow through the culverts.

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Thus, Moses claims, the culverts and the country road act as a dam when flood waters come, backing water into the subdivision and causing damage to the subdivision property and possibly to the town.

Earlier this year, Moses submitted a claim to the county commissioners for $4,200, for damage to subdivision property resulting from the flooding last year. The claim was denied.

Jay Calderwood, county road supervisor, testified at the hearing that channelization work by the developers had restricted the flow to a single channel, rather than thred channels which it had

occupied in the past. The stream enters the subdivision property in a single channel, but three sets of culvers under the county road carry water from three apparent channels out the bottom end of the subdivision. Restricting the flow to one channel increases flood problems, Calderwood said.

Moses' and Rockefeller, in a subsequent conversion with the *Teton Valley News*, refuted this claim as well, saying the stream actually splits into only two channels, and both channels have been maintained. The third apparent channel splits off where the water backs up at the comity road, they M, and not within the subdivision boundaries. Water is presently flowing through all three sets of culverts, they said.

Ron Carlson, regional supervisor of the Idaho Department of Water Resources, contacted by telephone on Idaho Falls, said

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his department's position continues to be that the situation is outside the jurisdiction of his department. The stream is intermittent according to his department's definition, and therefore outside the jurisdiction of the state stream channelization laws.

Also, he said, his department would not take any action anyway because of a lack of funds. He said determining the authority in this case would likely have to be done in the courts, and a single court case "would eat up our money for our stream channelization program."

The developers say the solution to the problem would be to replace the culverts under the county road with a bridge which could handle the peak flows

and would be less likely to become blocked with debris.

County officials have said they plan to install a bridge, but no time has been set. Estimates of cost for a bridge range from $15,000 to $40,000.

The flooding problem has become worse in recent years because farmers are doing more sprinkler irrigation and diverting less water into the canals, resulting in a higher peak flow downstream, according to Lavell Johnson.

The controversy over the matter is likely to continue for years, and no simple answers are apparent. At the hearing, Letham summed it up: "Right* now, I don't think any one individual can solve it-passing the buck isn't going to work. It's got to be handled together."

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Continental Real Estate Co.
Investments and Exchanges
130 North Main Driggs, Idaho 83522
Telephone: (208) 354-8771
Fax: (208) 354-8113
April 25, 1996

Mr. Robert A. Brochu
Corps of Engineers
1820 E. 17th St. Suite 350
Idaho Falls, ID 83404

Re: Maintenance of Teton Creek Stream Channel and
Irrigation Diversion in "The Aspens".

Dear Rob:

I am responding to your inquiry concerning our "County Mandated" stream channel maintenance, that has been done since 1980.

You have reported that the Corps of Engineers no longer has any records concerning their inquiry into the situation in the early 1980's. To shed some light on their involvement, I send herewith a copy of the Teton County Commissioners minutes of September 7, 1983.

The meeting was to discuss the replacement of some inadequate culverts with a bridge large enough to avoid backing the water up onto private property. They wanted to be assured that the Aspen's Homeowners

Association would continue to maintain the channel so the water would be delivered where they were going to build the new bridge.

Included also, is a copy of the November 28, 1983 Commissioners minutes further elaborating on our duty to the County, to maintain the channel if they built a new bridge. The log diversion mentioned was to protect an irrigation diversion point, which was worked very well for 16 years.

You will also find a copy of the referenced agreement that we made with Teton County for perpetual maintenance of the stream channel. We entered into this agreement in good faith, only after we were told the Corps of Engineers had no jurisdiction over maintenance of the channel and the irrigation diversion on the intermittent stream. (Note: Letter from Watermaster confirms its intermittent nature in spite of upstream diversions.)

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We continue to operate in good faith to meet our obligation to Teton County as well as our duty to protect the property of the numerous homeowners in "The Aspens".

Based on 16 years experience with this obligation, we know that water quality has been improved through the dramatic decrease of soil erosion, as a result of our efforts. We consider that an important factor in meeting the intent of the Clean Water Act.

I trust this will satisfy your inquiry.

Sincerely,

__/s/_____
C. Lynn Moses
President
Aspen Homeowners Assoc. Inc.

Enclosures

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CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS v. UNITED STATES & CARABELL v. UNITED STATES

This memorandum provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States[1] (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.[2] The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

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[1] 126 S. Ct. 2208 (2006)

[2] 33 U.S.C. § 1251 et seq.

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and function of the tributary itself and the function performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors.

Background

Congress enacted the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in compliance with other specified sections of the Act.[4] In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source[,]"[5] and provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."[6]

In Rapanos, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a "water of the United States." The justices issued five separate opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.

The Rapanos Decision

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the

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[3] 33 U.S. C. §1251(a)
[4] 33 U.S.C. § 1311(a), § 1362(12)(A).
[5] 33 U.S.C § 1362(12)(A).
[6] 33 U.S.C. § 1362(7). See also 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

term "waters of the United States" is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.[7] However, the plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. [8]

Justice Kennedy did not join the plurality's opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals.[9] Justice Kennedy agreed with the plurality that the statutory term "waters of the United States" extends beyond water bodies that are traditionally considered navigable.[10] Justice Kennedy, however, found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose[,]" and he instead presented a different standard for evaluating CWA jurisdiction over

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[7] Id. at 2220.

[8] Id. at 2225-27.

[9] Id. at 2236-52. While Justice Kennedy concurred in the Court's decision to vacate and remand the cases to the Sixth Circuit, his basis for remand was limited to the question of "whether the specific wetlands at issue possess a significant nexus with navigable waters." 126 S. Ct. at 2252. In contrast, the plurality remanded the cases to determine both "whether the ditches and drains near each wetland are 'waters,'" and "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection...." Id. at 2235.

[10] Id. at 2241.

wetlands and other water bodies.[11] Justice Kennedy concluded that wetlands are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of the other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[12]

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA's and the Corps' interpretation of "waters of the United States" was reasonable interpretation of the Clean Water Act.[13]

When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.[14] Thus, regulatory jurisdiction under

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[11] Id. at 2246.

[12] Id. at 2248. Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 126 S. Ct. at 2235-36.

[13] Id. at 2252-65. Justice Breyer wrote a separate dissenting opinion explaining his agreement with Justice Stevens' dissent. See 126 S. Ct. at 2266.

[14] See Marks v. United States, 430 U.S. 188, 193-94 (1977); Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J. concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test...that lower courts should apply," under Marks, as the holding of the Court); cf. League of United Latin American

the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied.[15] Since Rapanos, the United States has filed pleadings in a number of cases interpreting the decision in this manner.

The agencies are issuing this memorandum in recognition of the fact that the EPA regions and Corps districts need guidance to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the decision and supported by the administrative record. Therefore, the agencies have evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices. This approach is appropriate for a guidance document. The agencies intend to more broadly consider jurisdictional issues, including clarification and definition of key terminology, through rulemaking or other appropriate policy process.

Citizens vs. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275, 281-282 (2001) (same).

[15] 126 S. Ct. at 2265 (Stevens, J., dissenting) ("Given that all four justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.") (emphasis in original).

Agency Guidelines[16]

To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the Rapanos decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction.[17] Specifically, this guidance identifies

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[16] The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and the EPA and/or Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statues, regulations, and case law.

[17] This guidance focuses only on those provisions of the agencies' regulations at issue in Rapanos—33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7); 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7). This guidance does not address or affect other subparts of the agencies' regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of "waters of the United States." Indeed, the plurality opinion in Rapanos noted that "...there is no reason to suppose that our construction today significantly affects the enforcement of § 1342...The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional

those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the Rapanos opinions.[18] EPA and the Corps will continually assess and review the application of this guidance to ensure nationwide consistency, reliability, and predictability in our administration of the statute.

1. Traditional Navigable Waters (i.e., "(a) (1) Waters") and Their Adjacent Wetlands

Key Points

- The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3 (a)(1), and 40 C.F.R. § 230.3 (s)(1).
- The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.

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guidance on these and other provisions of the CWA that may be affected by the Rapanos decicion.

[18] In 2001, the Supreme Court held that use of "isolated" non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. See Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). This guidance does not address SWANCC, nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003. See 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

EPA and the Corps will continue to assert jurisdiction over "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."[19] These waters are referred to in this guidance as traditional navigable waters.

The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, "adjacent" means "bordering, contiguous, or neighboring." Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States."[20]

2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with

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[19] 33 C.F.R. § 328.3 (a)(1); 40 C.F.R. § 230.3 (s)(1). The "(a)(1)" waters include all the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

[20] Id. at 2248 (Justice Kennedy, concurring) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard of jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.")

a Continuous Surface Connection with Such Tributaries

Key Points

- The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).

- The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)

A non-navigable tributary[21] of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are "relatively permanent"—waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).[22] Justice Scalia emphasizes that relatively permanent waters do not include tributaries "whose flow is 'coming and

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[21] A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purpose of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). It is reasonable for the agencies to treat the stream reach as a whole in light of the Supreme Court's observation that the phrase "navigable waters" generally refers to "rivers, streams, and other hydrographic features." 126 S. Ct. at 2222 (Justice Scalia, quoting Riverside Bayview, 474 U.S. at 131). The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

[22] See 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that "relatively permanent" does not necessarily exclude waters "that might dry up in extraordinary circumstances such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months").

going at intervals...broken, fitful.'"[23] Therefore, "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional.[24] The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement."[25] Therefore, a continuous surface

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[23] Id. (internal citations omitted).

[24] Id. at 2226-27 (Justice Scalia, plurality opinion).

[25] Id. at 2232 n.13 (referring to "our physical-connection requirement" and later stating that Riverside Bayview does not reject "the physical-connection requirement") and 2234 ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.") (emphasis in original). See also 126 S. Ct. at 2230 ("adjacent" means "physically abutting") and 2229 (citing to Riverside Bayview as "confirm[ing] that the scope of ambiguity of 'the waters of the United States' is determined by a wetland's

connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike or similar feature).[26]

3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent

Key Points

- The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.
- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if the significantly affect the

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physical connection to covered waters...") (emphasis in original). A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2 (defining wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions").

[26] While all wetlands that meet the agencies' definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.

chemical, physical and biological integrity of downstream traditional navigable waters.

- "Similarly situated" wetlands include all wetlands adjacent to the same tributary.
- Significant nexus includes consideration of hydrologic factors including the following:
    - volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary.
    - proximity to the traditional navigable water
    - size of the watershed
    - average annual rainfall
    - average annual winter snow pack
- Significant nexus also includes consideration of ecologic factors including the following:
    - potential of tributaries to carry pollutants and flood waters to traditional navigable waters
    - provision of aquatic habitat that supports a traditional navigable water
    - potential of wetlands to trap and filter pollutants or store flood waters
    - maintenance of water quality in traditional navigable waters.
- The following geographic features generally are not jurisdictional waters:
    - swales or erosional features (e.g. gullies, small washes characterized

by low volume, infrequent, or short duration flow)

- ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent,[27] (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).[28] As described below, the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

The agencies' assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable

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[27] For simplicity, the term "tributary" when used alone in this section refers to non-navigable tributaries that are not relatively permanent.

[28] As described in Section 2 of this guidance, the agencies will assert jurisdiction, without the need for a significant nexus finding, over all wetlands that are both adjacent and have a continuous surface connection to relatively permanent tributaries. See pp. 6-7, supra.

waters is supported by five justices. Justice Kennedy applied the significant nexus standard to the wetlands at issue in Rapanos and Carabell: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[29] While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries[30], his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in Riverside Bayview and SWANCC, "the connection between a non-navigable water or wetland may be so close, or potentially so close, that Corps may deem the water or wetland a 'navigable

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[29] Id. at 2248. When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in SWANCC. Justice Kennedy cites SWANCC with approval and asserts that the significant nexus standard, rather than being articulated for the first time in Rapanos, was established in SWANCC. 126 S. Ct. at 2246 (describing SWANCC as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in SWANCC. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by SWANCC.

[30] 126 S. Ct. at 2247-50.

water' under the Act....Absent a significant nexus, jurisdiction under the Act is lacking."[31] Thus, Justice Kennedy would limit jurisdiction to those waters that have a significant nexus with traditional navigable waters, although his opinion focuses on the specific factors and functions the agencies should consider in evaluating significant nexus for adjacent wetlands, rather than for tributaries.

In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and

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[31] Id. At 2241 (emphasis added).

constant manner. Wetlands may also help to maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

When performing a significant nexus analysis,[32] the first step is to determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary, as characterized in Section 2 above, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point

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[32] In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'..."126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. Similarly, where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. Application of the significant nexus standard in this way is reasonable because of its strong scientific foundation—that is, the integral

ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.[33] Other physical indicators of flow

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[33] See 33 C.F.R. § 328.3(e). The OHWM also serves to define the lateral limit of jurisdiction in a non-navigable tributary where there are no adjacent wetlands. See 33 C.F.R. § 328.4(c). While EPA regions and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the Corps' regulations identify the factors to be applied. These regulations have recently been further explained in Regulatory Guidance Letter (RGL) 05-05 (Dec. 7, 2005). The agencies will apply the regulations and the RGL and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide.

may include shelving, wracking, water staining, sediment sorting, and sour.[34] Consideration will also be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.[35] The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf

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[34] See, Justice Kennedy's discussion of "physical characteristics," 126 S. Ct. at 2248-2249.

[35] See, generally, 126 S. Ct. at 2248-53; see also 126 S. Ct. at 2249("Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries....") (citing to Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 524-25(1941)).

litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions related to maintenance of downstream water quality such as sediment trapping.

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.

Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and it adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or

insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.[36] Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).[37]

Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to

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[36] See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
[37] 33 U.S.C. § 1362 (14).

downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

Documentation

As described above, the agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters. For purposes of CWA § 404 determinations by the Corps, the Corps

and EPA are developing a revised form to be used by field regulators for documenting the assertion or declination of CWA jurisdiction.

Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts and EPA regions will also demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water. As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the bases for

asserting or declining CWA jurisdiction.[38] Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional determinations for complex projects may require additional documentation by the project manager.

s/ Benjamin H. Grumbles
Benjamin H. Grumbles
Assistant Administrator for Water
U.S. Environmental Protection Agency

s/ John Paul Woodley, Jr.
John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)
Department of the Army

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[38] For jurisdictional determinations and permitting decisions, such information shall be posted on the appropriate Corps website for public and interagency information.

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sentencing memorandum, has gone way beyond 2002, 2003, and 2004. And in the presentence report, the probation officer talks about how the Court could enhance and maybe should enhance the penalty in this case based on the fact that there is a 25-year history in this case. Now, if the Court is - -

THE COURT: No. I understand your position. Again, just so we're clear, Mr. Breitsameter, the Government is willing to stipulate that there was no discharge into any wetlands arising out of this case; correct?

MR. BREITSAMETER: That's correct, Your Honor.

THE COURT: But you cannot bind the Government by way of a stipulation that the Government perceives discharges into wetlands as being more serious than discharges into other riparian non-wetland areas?

MR. BREITSAMETER: To my knowledge, we have

not explored that issue and I am not prepared to stipulate to that.

THE COURT: All right. I will allow the witness to testify factually as to his understanding of the Corps of Engineers' views during the time period that he was employed there, and limit it in that fashion.

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A. That's correct.
Q. Have you observed the creek when there is water in the creek itself?
A. Oh, yes.
Q. Flowing?
A. Yes.
Q. And what time of the year does that generally occur?
A. The creek usually starts to run about first week of May, and it runs on into July.
Q. Does the duration of the flow vary depending on the snow pack and the rainfall?
A. Quite a bit, yes. In a dry year, it will flow for a while and shut down and then flow again. A good wet year may flow pretty much continually for that two-month period.
Q. And whether it does flow, Mr. Fitzgerald, can you describe for the jury what it's like?
A. It can be a raging torrent when there is a lot of water in it. It can be a dangerous creek to cross. My wife and I frequently sit on the back porch that

faces the creek, and we can hear big trees coming down,
being eroded away and falling into the creek and them
being moved downstream.
So it's a major torrent when it's flowing.

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this stream, correct, because of its intermittent nature?
A: You mean in the reach that we're speaking of?
Q: Yes.
A: Yes, that's correct.
Q: There is really no aquatic wildlife issue with regard to this stream; is there?
A: That's correct.
MR. ATKIN: That's all I have.
THE COURT: Anything else, Mr. Oesterle?
MR. OESTERLE: No, our Honor.
THE COURT: You may step down, Mr. Miller.
Thank you.
I assume the witness can be excused?
MR. ATKIN: Yes, Your Honor.
MR. OESTERLE: Yes, Your Honor.
THE COURT: Call your next witness. Mr. Peak,
I assume?
MR. OESTERLE: Yes, Your Honor.
THE COURT: Mr. Peak, will you step before the
clerk and be sworn.

CHARLES PEAK,

called on behalf of the Government, having been first
duly sworn upon oath, was examined and testified as

25 follows: